

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF OHIO

3 WESTERN DIVISION

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5 MARK HOOP, et al., : CIVIL ACTION 1:00cv869
6 :
6 Plaintiff, : Cincinnati, Ohio
7 : Monday, February 2, 2004
7 -vs- :
8 : Day 1 of trial
8 :
9 JEFFREY HOOP, et al., : Motion in limine
9 :
10 Defendant. : 9:00 a.m.

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12 EXCERPT OF PROCEEDINGS
13 BEFORE THE HONORABLE SUSAN J. DLOTT, JUDGE

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14 For the Plaintiffs: Alfred Mangels, Esq.
15 4729 Cornell Road
16 Cincinnati, Ohio 45241

17 Timothy A. Magee, Esq.
18 130 Sherman Drive
Findlay, OH 45840

19 For the Defendants: Stella B. House, Esq.
20 Post Office Box 422
Manchester, Kentucky 40962

21 Law Clerk: Aly Stang
22 Courtroom Deputy: Steve Snyder
23 Court Reporter: Betty Schwab
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EXCERPT OF PROCEEDINGS

THE COURT: Are there any questions with regard to opening statements, what can be said?

MR. MAGEE: Well, Your Honor, there are two pending motions in limine.

THE COURT: Are those going to affect anything you were going to say in opening statements?

MR. MAGEE: I think potentially it's possible. We don't know what the defendant is going to say.

THE COURT: You go first anyway.

MR. MANGELS: Yes, I know.

MS. HOUSE: It definitely could.

MR. MAGEE: Because their motions are pretty core issues that we could probably talk about.

MS. HOUSE: Another thing that we wanted to bring to the Court's attention or mention to the Court is, on the fairing that is the physical exhibit there, of course we did agree jointly to have a fairing as an exhibit, but we did not realize that it would have a sort of an advertisement or whatever for American Aesthetics on it. And we will ask that be concealed or covered in some way.

MR. MAGEE: Sure.

MR. MANGELS: No objection.

THE COURT: You've got to give me some clue as to what you think is going to come up in opening statement

1 that you might have a question about.

2 MS. HOUSE: We might want to talk about
3 co-inventorship as one thing that would be a problem as far
4 as what they're entitled to as far as damages, whether
5 that's going to be limited to specifically what they
6 requested in their prayer for relief or be something
7 broader.

8 THE COURT: I think in opening they can argue --
9 not argue. I apologize. I think in opening statement they
10 can say that's what we intend to prove. Now, whether they
11 can prove it or not is something else. But I guess they're
12 entitled to say that they believe that they are the
13 co-inventors of the fairing guard design.

14 MS. HOUSE: But, Your Honor, our position is that
15 that was never pled in any of the pleadings, that there was
16 never any request in any of their prayers for relief that
17 they be deemed to be co-inventors, in other words,
18 Plaintiffs and Defendants as co-inventors. And so my
19 motion basically is asking that that not be permissible,
20 because it was never pled. And, as a matter of fact, when
21 they filed the second amended complaint and asked to add
22 that as a prayer for relief, the motion was denied.

23 MR. MANGELS: Your Honor, I think it's probably
24 implicit, where each side is claiming to be the inventor,
25 the jury has the option of going either end or somewhere in

1 the middle if they wish.

2 THE COURT: I think that makes sense. Yes, I'm
3 going to allow it.

4 MR. MANGELS: We filed two motions in limine
5 also, Your Honor, one directed to the preliminary
6 injunction. We don't want the jury to hear anything about
7 that because it would prejudice them.

8 THE COURT: Right. I don't see any reason to
9 discuss that.

10 MR. MANGELS: Also the fact that they had
11 initiated a vacation proceeding against our patent. Again,
12 that has no bearing because the patent office has made no
13 decision. They're deferring to the Court.

14 THE COURT: Right. I see no reason that would be
15 relevant either.

16 MR. MAGEE: Last, Defendants also filed a motion
17 in limine as part of, well, as one motion regarding
18 discussion of a breach of contract. I don't really see how
19 we cannot discuss that. For one, they have their own
20 contract claim, and it's basically an essential element,
21 you know, what was the agreement between these people; who
22 was going to do what.

23 MR. MANGELS: And -- excuse me, Your Honor -- but
24 the complaint also has a recitation of the fact that
25 neither Lisa Hoop nor Mark Hoop were fully compensated.

1 That's in there, been in there from the beginning.

2 THE COURT: That's been in there from the
3 beginning. The breach of contract has not. You may have a
4 theory of quantum meruit. But I don't think the breach of
5 contract was pled in time for you to say that there is a
6 breach of contract. I think it's strictly a quantum meruit
7 theory. They can say they performed services. They can
8 testify they performed services and this was the charge
9 what their service was, but there was no terms of the
10 contract.

11 MS. HOUSE: And with regard to, I guess, what
12 they can argue or present in that area, part of my concern
13 was that it seemed like that their expert and also their
14 desire to use a lot of the Clairson exhibits and some of
15 those things might be to show what someone else would have
16 charged to do that kind of thing. And in their prayer for
17 relief, you know, they specifically said, you know, Mark
18 said that he wanted compensation for his time and efforts.
19 And, you know, there was just specific language in their
20 prayer for relief, so --

21 THE COURT: I'm not sure if comparable can be
22 relevant.

23 MS. HOUSE: I don't think they are.

24 THE COURT: I don't think they are, yes. He can
25 testify what his standard price is, what his standard

1 hourly rate is or whatever. But, when you get into
2 comparables, you would have the show that the services were
3 comparable, and it would be a lot more complicated.

4 MR. MANGELS: Well, Your Honor, my expert is
5 going to be testifying to what the reasonable cost for one
6 of those devices is, the device that Mark had generated as
7 a result of his effort.

8 MS. HOUSE: That's exactly what I'm saying, that
9 I don't think that's relevant in this particular case.

10 THE COURT: Yes. It may not be. I don't know.

11 MS. STANG: I didn't realize that's what those
12 exhibits were for. I didn't understand the nature of them,
13 I guess.

14 MR. MANGELS: It has to do with the extent of the
15 compensation to which Mark might be entitled as a result of
16 his efforts.

17 THE COURT: Almost sounds like a Daubert issue as
18 to whether or not the person is entitled to testify what
19 his expertise is in the field, and I don't know what his
20 expertise is first of all. You know, he's certainly going
21 to have to be voir dired on that.

22 MS. HOUSE: Richard Luther, I think that's his
23 name, and I mean basically his statement or, you know,
24 report that was submitted just says, well, this is what it
25 would cost to do this; this is what it would cost to do

1 that.

2 THE COURT: There has got to be a foundation. If
3 he's opining, then he's got to be qualified as an expert.

4 MS. HOUSE: And, but I just don't think it's
5 relevant in this particular case, because what's relevant
6 is Mark's time and efforts. That's all he asked for in his
7 prayer for relief, which would have nothing to do with what
8 it might cost Mr. Luther or anyone else to do that kind of
9 thing.

10 THE COURT: Well, I don't think at this point it
11 can be referred to in opening statement, because I think
12 that's definitely an issue that's going to have to be
13 decided in the context of the evidence.

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15 EXCERPT CONCLUDED

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18 C E R T I F I C A T E

19 I, Betty J. Schwab, the undersigned, do
20 hereby certify that the foregoing is a correct
21 transcript from the record of the proceedings in
22 the above-entitled matter.

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BETTY J. SCHWAB, RPR
Official Reporter